CAROLYN A. QUATTROCKI
Chief Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CARRIE J. WILLIAMS
Deputy Attorney General

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

PETER V. BERNS
General Counsel

CHRISTIAN E. BARRERA
Chief Operating Officer

ANTHONY G. BROWN
Attorney General

April 1, 2025

To: The Honorable Joseline A. Pena-Melnyk
Chair, Health and Government Operations Committee

From: Office of the Attorney General

Re: Senate Bill 555 - Public Information Act - Denials - Pending Litigation (FAVORABLE)

The Office of the Attorney General ("OAG") urges support for **Senate Bill 555** – Public Information Act – Denials – Pending Litigation, as amended in the Senate. **Senate Bill 555** creates a new exemption in the Public Information Act ("PIA") that would allow—but not require—a custodian to withhold certain records created for purposes of litigation until the litigation is over. The exemption would be in addition to any other exemptions, like the attorney-client privilege or the attorney work product doctrine, that might apply to some of the records. But, like all discretionary exemptions, to invoke the exemption, the custodian would need to demonstrate that disclosure of the record(s) would be contrary to the public interest. *See* Md. Code Ann., Gen. Prov. ("GP") § 4-343.

More specifically, the bill would give custodians discretion to "deny inspection of a record created for purposes of pending or reasonably anticipated litigation to which (1) the State, a State agency, or a political subdivision of the State is or may be a party; or (2) an office or employee of the State or a political subdivision of the State, because of that person's office or employment, is or may be a party." The bill, as amended, also provides a definition of "reasonably anticipated litigation" to mean "a situation where there is concrete evidence that litigation is expected to occur based on current facts and circumstances."

Similar exemptions exist in the public records laws of at least seven other states: California, Delaware, Missouri, Oklahoma, Oregon, Texas, and Vermont. The proposed exemption is also similar in spirit to a provision in Maryland's Open Meetings Act that permits public bodies to close meetings to "consult with staff, consultants, or other individuals about pending or potential litigation." GP § 3-305(b)(8). If a public body can close a meeting to discuss that topic, it does

not make sense that it would have to disclose public records that reveal the same type of information as in those discussions.

The bill, as amended, would serve two primary purposes. First, it would protect the integrity of the adversarial judicial system by preventing opposing litigants from using the PIA to obtain sensitive records created by a government agency for the very purpose of the litigation. In the adversarial system, most litigants can only obtain that type of information, if at all, through discovery. But government litigants are put at an unfair disadvantage in litigation if public records laws can be used to obtain sensitive information created for the litigation, especially when the government cannot obtain similar information from their private party adversaries in the litigation. To be clear, the bill as amended would not preclude litigants or potential litigants from obtaining underlying documents that pre-existed the anticipation of litigation and were created in the ordinary course of business, even if they might become relevant evidence in the litigation itself. Rather, the proposal is aimed at records specifically created for purposes of the pending or anticipated litigation, such as assessments by the agency of the merits of various claims, discussions with potential co-parties about the possibility of bringing affirmative litigation together, or even settlement negotiations between the parties that all parties assumed would remain confidential. These categories of documents will often be protected by existing privileges, like the attorney work product doctrine, but not always. This proposal attempts to close any loopholes in existing law that might allow an opposing litigant to obtain sensitive litigation materials through the PIA.

Second, the bill would prevent opposing parties or their allies from using the PIA as a tool to disrupt a government entity's litigation efforts, including the affirmative litigation our Office brings to vindicate the public interest and the rights of Marylanders. This is not just a theoretical concern. Sometimes, broad PIA requests (often from third parties allied with litigants) for records created for purposes of litigation seem to be designed specifically to disrupt the work of the attorneys working on the litigation. The proposed exemption would address that problem by creating an easier-to-administer rule that offers presumptive protection to all records created for purposes of the pending or reasonably anticipated litigation. Although many such records are already protected by existing privileges like the work product doctrine, deliberative process privilege, or others, those are technical legal doctrines that can be uncertain in application to specific facts. An exemption like this one would clarify that the presumptive protection applies to all these sensitive records created for purposes of the litigation, without having to determine document by document or line by line whether those documents are protected under the technical intricacies of an existing privilege or exemption. That, in turn, would cause significantly less disruption to the work of the government attorneys during the litigation.

For the reasons stated above, the OAG urges a favorable report on **Senate Bill 555**.